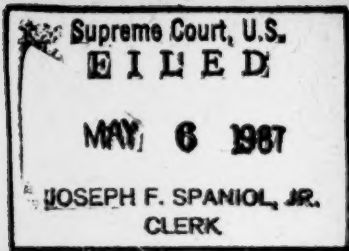


(2)
No. 86-1468



In the Supreme Court of the United States

OCTOBER TERM, 1986

BSP INVESTMENT AND DEVELOPMENT, LTD., PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

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7/8/87

TABLE OF AUTHORITIES

	Page
Cases:	
<i>Berkemer v. McCarty</i> , 468 U.S. 420 (1984)	4
<i>Helvering v. Minnesota Tea Co.</i> , 296 U.S. 378 (1935)	4
<i>McCullough v. Kammerer Corp.</i> , 323 U.S. 327 (1945)	4
<i>One Lot Emerald Cut Stones v.</i> <i>United States</i> , 409 U.S. 232 (1972)	4
<i>Schweiker v. Wilson</i> , 450 U.S. 221 (1981)	5
<i>United States v. One (1) Lot of \$24,900.00</i> <i>in U.S. Currency</i> , 770 F.2d 1530 (11th Cir. 1985)	3
<i>United States v. San Juan</i> , 545 F.2d 314 (2d Cir. 1976)	5
<i>United States v. Von Neumann</i> , No. 84-1144 (Jan. 14, 1986)	4
Constitution and statutes:	
U.S. Const. Amend. XIV (Equal Protection Clause)	1, 4
Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, § 901(c), 98 Stat. 2135	2
31 U.S.C. 5316	1, 2, 3, 4
31 U.S.C. 5317	1, 3, 4



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Petitioner contends that the court of appeals erred in holding it subject to civil forfeiture under 31 U.S.C. 5316 and 5317, despite the fact that its principals purportedly lacked knowledge of the applicable currency reporting requirements. Petitioner also asserts that its rights under the Equal Protection Clause were violated because, unlike persons who enter the United States by air, entering motorists are not furnished with reporting information and declaration forms.

1. Petitioner is a Canadian corporation. On February 22, 1979, Stark and Pascoe, principal officers of petitioner, entered the United States from Canada by car. They were stopped by United States Customs Service agents at the Port of Entry in Eastport, Idaho, for a routine inspection. While examining their car, a customs inspector observed several sealed envelopes and asked Stark and Pascoe

whether they were carrying more than \$5,000 in currency. The men falsely stated that they were carrying only about \$4,000. Pet. App. 2a.

The inspector advised Stark and Pascoe that he wanted to verify the amount of currency in their possession. The two men then produced three envelopes containing \$12,000. The inspector apprised Stark and Pascoe that they were required to report currency in excess of \$5,000.¹ Pascoe said that he had not wanted to be bothered with disclosure forms, which he referred to as "IRS" forms. Pascoe then stated that he and Stark wished to declare the \$12,000. Pet. App. 2a.

The inspector continued his examination and discovered some additional envelopes. Inside, the inspector found more currency. In all, the inspector found a total of \$47,980 in Canadian currency and seized it. Pet. App. 2a.

The following day, the government issued a Notice of Seizure to petitioner. On April 20, 1979, petitioner filed a petition for administrative relief with the Customs Service. Customs notified petitioner that it would not act on the petition until the United States Attorney decided whether or not to file criminal charges. On August 13, 1979, Customs informed petitioner that no criminal charges would be filed. Thereafter, on December 13, 1979, Customs denied remission of the forfeiture and referred the case to the United States Attorney to commence a civil forfeiture action. Pet. App. 2a-3a.

On April 2, 1980, the government instituted its civil forfeiture action against petitioner (Pet. App. 18a). The district court initially granted summary judgment for petitioner

¹As amended in October 1984, Section 5316 now requires a report when persons transport in excess of \$10,000. See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, §901(c), 98 Stat. 2135.

because of the delay in commencing the proceedings. The court of appeals affirmed (Pet. App. 18a-21a), but on rehearing (Pet. App. 13a-17a) it reinstated the action and remanded the case for trial. Following trial, the district court entered judgment for the United States (Pet. App. 10a-12a). It rejected as "without merit" petitioner's contention that Stark and Pascoe lacked knowledge of the currency reporting requirements and found "not credible" the testimony of petitioner's witnesses. Pet. App. 11a. The court also concluded that the 14-month hiatus between the seizure of the currency and the institution of forfeiture proceedings did not violate due process. *Ibid.*

2. The court of appeals affirmed by a divided vote (Pet. App. 1a-9a). The court agreed that petitioner's due process rights had not been violated by the delay in commencing the forfeiture action. Pet. App. 4a-6a. The court also held (*id.* at 6a-8a) that a person may be subject to civil forfeiture under 31 U.S.C. 5316 and 5317 even if he lacks knowledge of the currency reporting requirements. In any event, the court noted (Pet. App. 8a), Stark and Pascoe had been given an opportunity to report the correct amount of their currency but instead had lied about the amount that they had to declare.²

3. Noting a conflict between the decision in this case and that of the Eleventh Circuit in *United States v. One (1) Lot of \$24,900.00 in U.S. Currency*, 770 F.2d 1530 (1985), petitioner asks (Pet. 7-11) the Court to resolve the question whether a traveler's knowledge of the currency reporting requirements is an element in a civil forfeiture action under 31 U.S.C. 5316 and 5317. This case is not an appropriate vehicle in which to resolve that conflict. As the district court

²District Judge Stephens dissented (Pet. App. 8a-9a). He concluded that it is unfair to seek civil forfeiture without having first notified persons in writing of the applicable reporting requirements.

found (Pet. App. 11a)—and as the court of appeals confirmed (Pet. App. 8a)—petitioner's principals knew of the currency reporting requirements but simply chose to lie to the inspector about how much currency they were transporting. Pascoe made clear that he did not wish to be bothered with a reporting form, characterizing it as an "IRS" form. Thus, the decision in this case would have been the same whether or not knowledge is an element of a civil forfeiture proceeding under Sections 5316 and 5317.

In any event, the court of appeals correctly concluded that knowledge is not required under the civil forfeiture provisions. Section 5316, as presently amended, requires travelers to "file a report * * * when the person * * * knowingly * * * transports * * * more than \$10,000." Section 5317 authorizes the seizure of currency when a report has not been filed. Neither section, by its terms, requires the government to prove that the person subject to seizure had knowledge of the applicable reporting requirements. Indeed, it is settled that the government may establish a civil forfeiture merely by showing that the property was brought into the country without the required declaration; it need not prove intent. See *United States v. Von Neumann*, No. 84-1144 (Jan. 14, 1986), slip op. 7 (quoting *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 234 (1972)).

4. Petitioner also contends (Pet. 11-15) that the Customs Service issues written notice forms of the currency reporting requirement to air travelers, but for travelers by car it only posts such information at border checkpoints. Petitioner asserts that that difference in treatment violates the Equal Protection Clause. This claim is meritless. First, petitioner did not raise this constitutional claim in the courts below and thus may not raise it here. See, e.g., *Berkemer v. McCarty*, 468 U.S. 420, 443 (1984); *McCullough v. Kammerer Corp.*, 323 U.S. 327, 328-329 (1945) (per curiam); *Helvering v. Minnesota Tea Co.*, 296 U.S. 378, 380 (1935).

Moreover, because petitioner did not raise the claim below, there are no findings in the record to support petitioner's assertion that the Customs Service in fact maintains materially different reporting practices for air travelers and motorists. In any event, petitioner does not explain why these purported differences in treatment do not "rationally advance[] [the] reasonable and identifiable governmental objective" (*Schweiker v. Wilson*, 450 U.S. 221, 235 (1981)) of securing currency reports while at the same time accommodating the logistical differences between air and motor vehicle travel.³

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MAY 1987

³*United States v. San Juan*, 545 F.2d 314 (2d Cir. 1976), is not germane. The court of appeals in that case reversed defendant's conviction because the jury was permitted to convict on a theory that the government did not rely on at trial. The *San Juan* case did not involve any issue of disparate treatment of air travelers and motorists.